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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 888

STORER BROADCASTING COMPANY, DETROIT FIRE & MARINE INSURANCE COMPANY AND ASSOCIATED AVIATION UNDERWRITERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Northern District of Alabama, Southern Division, rendered no opinion. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 37–39) is reported at 251 F. 2d 268.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1958. The petition for a writ of certiorari was filed on April 2, 1958. The jurisdiction of this Court is presumably invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a member of the Air National Guard of the State of Alabama who has not been ordered into active federal service is an "employee" of the United States, as defined in the Federal Tort Claims Act, so as to make the United States liable for his negligence.

STATUTES INVOLVED

The pertinent sections of the Federal Tort Claims Act, as codified in Title 28, U. S. C., provide:

§ 1346. United States as defendant.

* * * * *

(b) * * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 2671. Definitions.

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the

United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

* * * * *

STATEMENT

Petitioners instituted this Federal Tort Claims Act suit against the United States in the District Court for the Northern District of Alabama, seeking to recover for property damages allegedly caused by the negligence of a member of the Air National Guard of the State of Alabama (R. 1-2). This property damage resulted from a collision, on February 5, 1954, between a DeHaviland Dove aircraft owned by the Storer Broadcasting Company and an F-51 aircraft loaned to the Alabama Air National Guard by the Department of the Air Force pursuant to the applicable provisions of law (R. 302, 307).

The F-51, operated by Major Stuart H. Daigneau on a training mission for the Alabama Air National Guard, skidded off the runway on landing at Birmingham Municipal Airport and collided with the DeHaviland Dove, which was parked about 100 feet from the landing strip (R. 307). There was no evidence showing either a mechanical defect in the plane

or unusual atmospheric conditions (R. 308). The District Court observed that "thus it might be inferred" that the accident occurred because of Daigneau's negligence (R. 308). Daigneau "had a full-time civilian occupation" and "was not a regular member of the United States Air Force" (R. 308). Neither he nor the Alabama Air National Guard were in active federal service at the time of the accident (R. 308).

The District Court concluded that, while the United States owned the F-51, it did not maintain, control, or operate it at the time of the accident (R. 308–309). The court further ruled that Daigneau, who was on a training mission for the Alabama Air National Guard at the time of the accident, was not an employee of the United States for the purposes of the Federal Tort Claims Act (*ibid.*). Judgment was accordingly entered for the United States (R. 309–310).

The Court of Appeals unanimously affirmed, holding—on the basis of "a formidable array" of over thirty decided cases—that members of a state National Guard unit, who have not been called into active federal service, are not federal employees within the meaning of the Federal Tort Claims Act (Pet. App. 37–39).

ARGUMENT

The issue presented by this case is, as petitioners acknowledge (Pet. 2), the same as the basic issue raised by the petition in *Prager, et al.* v. *United*

States, No. 866, this Term. Our *Prager* brief in opposition, to which we respectfully refer the Court, reviews the constitutional and statutory relationship between the state National Guards and the United States and shows that members of the National Guard are only to be considered in the active service of the United States when ordered thereto in accordance with law and that at all other times National Guard personnel are state employees.[1]

Nevertheless, as in *Prager*, petitioners attempt to distinguish the present case and *Prager* from the many earlier cases presenting the same issue on the ground that only in the present cases is there evidence showing supervision and control in the United States over the allegedly negligent National Guardsmen (Pet. 23–24). While we recognize that an important factor, in determining whether or not an individual is an employee of the United States for the purpose of imposing liability under the Federal Tort Claims Act, is the authority of the United States to direct and control the individual in the performance of the act or omission which caused the injury, *e. g.*, *Harris* v. *Boreham*, 233 F. 2d 110 (C. A. 3), the record in this

[1] It should be noted that the provisions of Title 32 of the United States Code, which were cited in that brief, refer only to the relationship between the Army and the National Guard. However, these provisions (Pet. App. 40–43) were made applicable to the Air National Guard by Transfer Order No. 10, dated April 27, 1948, 13 F. R. 2428 (May 6, 1948), which implemented 61 Stat. 503 (1947), 5 U. S. C. 626 (f), and 61 Stat. 504 (1947), as amended, 5 U. S. C. 626c (e).

case clearly fails to establish such authority.[2] To the contrary, the evidence underscores the correctness of the District Court's findings that the pilot and plane involved here were under the control and direction of the Alabama Air National Guard, not the United States. The record shows that the pilot of the F-51 was a member of the Alabama Air National Guard (R. 84, 87, 97);[3] that the planes used by the Alabama Air National Guard were inspected, serviced, and maintained by it (R. 186, 189, 244); that the Alabama National Guard had complete and exclusive command authority over its personnel and equipment (R. 96, 100, 115, 162, 167, 302); that the Alabama Air National Guard had not been called into active federal

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[2] Admittedly, whether an employee of the Government is acting within the scope of his employment must be resolved on the basis of the *respondeat superior* law of the place where the act or omission occurred. 28 U. S. C. 1346 (b); *Williams* v. *United States*, 350 U. S. 857. On the other hand, as the Second Circuit has held in *Courtney* v. *United States*, 230 F. 2d 112, the threshold question of whether a person is an "employee of the government" as defined in 28 U. S. C. 2671 depends solely on federal law. In any event, even if reference to state law were appropriate to determine whose employee a guardsman is, the Alabama cases cited by petitioners (Pet. 27-28) apply the usual right of control test and fully support the result reached by the courts below.

[3] Contrary to the statement in petitioners' brief (Pet. 33), Major Daigneau ceased to be a member of the Air Force Reserve when he became a member of the Alabama Air National Guard (R. 97-99). As a member of the Alabama Air National Guard, Major Daigneau was also in the Reserve of the Air Force since both the Air National Guard of the United States and the Air Force Reserve are reserve components of the Air Force. 50 U. S. C. 1091. Memberships in these two reserve components are mutually exclusive. 50 U. S. C. 1115.

service at the time of the accident (R. 13, 83–85, 195); that the United States Air Force did not have any command authority over the flight operations of the Alabama Air National Guard (R. 108, 198, 200, 271); and that the flight which resulted in the accident was authorized and ordered by the Alabama Air National Guard (R. 198, 200, 298–301).

There is also no substance to petitioners' assertion of a conflict (Pet. 2, 25) with *O'Toole* v. *United States*, 206 F. 2d 912 (C. A. 3), where it was held that a member of the District of Columbia National Guard, though not called to active duty, was a federal employee for the purpose of imposing liability on the United States under the Federal Tort Claims Act. The Third Circuit in that case emphasized the fact that the control and command over the District of Columbia guardsmen at all times ran from the President and that control by the District of Columbia is lacking. The court noted specifically that the President, not the District Commissioners, exercises the powers of commander-in-chief, that the President appoints guard officers and courts martial, and that only the President has the right to call out the guard to suppress a riot or otherwise meet an emergency. In all these respects, the District of Columbia National Guard is unique because the President has the control which the governors of the various states exercise over the state National Guards. And as we have shown, *supra*, the record shows clearly that here Alabama officials exercised full control and supervision over the guardsman involved.

CONCLUSION

For these reasons, as well as those stated in our brief in opposition in *Prager* v. *United States*, *supra*, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1958.